



# UTFA Bargaining Report

University of Toronto Faculty Association December 5, 2011

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## Bargaining Report #3 - 2011

### EXPANDING THE ROLE OF INTEREST ARBITRATION IN OUR NEGOTIATIONS: A RESPONSE TO THE PROVOST

In her communications to faculty and librarians, the Provost has used strong language to criticize UTFA's proposal for expanding the role of neutral, independent and professional arbitration in our negotiations. This includes terms such as: "unworkable", "inflexible", "bureaucratic", "adversarial", "disastrous", "impeding disciplinary and departmental autonomy", and "eroding" or "betraying" the "core institutional values of excellence and collegial self-governance".

This kind of hyperbole is both dismissive of and disrespectful to the legitimate interest that faculty and librarians have in a stronger voice to shape the conditions under which we work as teachers, scholars and professionals. What's more, the Provost's rhetoric presents a distorted, misleading caricature of the interest arbitration process.

Other than the right to strike (and the corresponding right for employers to lock out), interest arbitration is the only widely accepted mechanism for fairly resolving differences in negotiations over terms and conditions of employment. As we have discussed in earlier communications, the current framework under which UTFA negotiates with the Administration features a combination of unilateralism and frozen policies, both of which undermine collegiality and academic self-governance.

In this bargaining report, we respond to the Provost's assertions about interest arbitration, and describe how the process actually works. We also situate UTFA's proposal for expanding the scope of interest arbitration within the broader context of the need for change in the relationship between faculty and librarians on the one hand, and the University Administration on the other.

#### **A. Interest Arbitration is commonplace**

Interest arbitration is commonplace in those workplaces involving essential services, as well as where the parties to the negotiations have agreed that strikes and lockouts are undesirable or inappropriate.

Other employees who have binding arbitration, but are not considered to be essential service providers, include Ontario Government lawyers, medical residents, some university faculty, some physician groups, and a number of miscellaneous employee types in a variety of institutional settings. In general, interest arbitration tends to be more prevalent in professional settings.

It would be very difficult for any informed observer to study the history of interest arbitration and conclude that arbitration decisions have been radical, dangerous, disastrous, unworkable, or corrosive of core institutional values. If anything, interest arbitration in the hospital sector, for example, has been heavily criticized as being too conservative in responding to employee proposals, particularly on non-monetary matters.

At the U of T, compensation has been subject to mediation and arbitration since the early 1980s. We may now draw on more than twenty years of history in the use of this mechanism, none of which can be said to have endangered the institution or its values. Indeed, the Administration has quite paradoxically praised the historical record in our use of interest arbitration and yet deemed its wider application somehow inappropriate in the university context.

What is fundamental in all of this is that outside of essential services, employers involved in comprehensive collective bargaining are indeed free to decline the involvement of interest arbitrators to resolve outstanding differences. However, should they do so, their employees have the right to strike. And where an employer chooses interest arbitration in preference to the right to strike, interest arbitration extends to negotiations over all compensation and non-compensation matters. Thus, it seems clear that the Administration's objection to expanding the scope of mediation and interest arbitration is designed to maintain unilateral control.

Moreover, *the U of T Administration has no objective basis of any kind, and no evidence whatsoever, to substantiate its bare assertion that interest arbitration over faculty and librarian terms and conditions of employment would undermine core institutional values of excellence and collegial self-governance.*

## **B. Why does interest arbitration not produce radical or dangerous awards?**

### **1. Interest arbitration is a last resort**

In general terms, the role of interest arbitration is to serve as a forum of last resort. That interest arbitration is not a process through which one party can reasonably hope to gain what it could not gain through bargaining is well understood by arbitrators. For example, as one respected interest arbitrator has pointed out:

“Interest arbitration serves a valuable function in that it can objectively resolve the terms and conditions of a collective agreement....But interest arbitration is not a substitute for collective bargaining. It is not a forum that any party should approach with the hopes of gaining what it could not achieve through collective bargaining. The application of the rectification principle means that parties should understand that arbitration can and should only award what the parties could reasonably expect to achieve through full, functional and principled bargaining. Interest arbitration should then be understood as the forum of last resort. It should only be invoked when real impasse has been reached and only after the parties have given themselves the opportunity to engage in informed explorations of the rationale and implications of their respective positions.”

– Arbitrator Paula Knopf, *Durham Regional Police Association v. Durham Regional Police Services Board*, 2007, pp. 2–3.

### **2. Interest arbitration is conservative because it employs conservative criteria**

The essential philosophy adopted by virtually all interest arbitrators is one of replication of what free collective bargaining would produce. In other words, arbitrators neither legislate nor adjudicate fairness in the abstract, nor simply impose their own view (as is strongly implied by the Provost). Arbitrators are guided by results typically freely negotiated by other parties.

As Kevin Burkett, one of Canada's most respected and experienced arbitrators, recently put it in his award concerning pensions at Air Canada, arbitrators look to “benchmarks in the community and to the

bargaining history between the parties”. In other words, arbitrators look to objective criteria in the form of agreements on terms and conditions negotiated by other appropriate comparators, and to the conduct and history of the parties, in order to ascertain what free collective bargaining would have produced had it succeeded in the bilateral phase.

This approach of arbitrators applies equally, if not more so, to non-monetary matters where arbitrators tend to be highly respectful of employer responsibilities, and to be sensitive of and defer to the core values of the institution. In addition to the replication principle, when it comes to changes to non-monetary policies, arbitrators also apply the principles of “gradualism” and “demonstrated need”. As explained by Arbitrator Burkett, gradualism “reflects the reality that collective bargaining between mature bargaining parties... is a continuum that most often accomplishes gradual change as distinct from drastic change,” while the principle of demonstrated need serves as a complementary brake on significant changes, “requiring a party seeking a major... change [to] convincingly establish the need for such change.”

Moreover, interest arbitration is generally understood by the parties themselves and the arbitrators not as a freestanding adjudicative process to determine “right” from “wrong”. Rather interest arbitration is seen as an extension of the collective bargaining process. This is simply a consequence of the replication theory which sees arbitration as producing results consistent with what would be produced by collective bargaining itself were the parties able to agree.

### **3. Interest Arbitration at the University of Toronto has been and will continue to be premised on a continuing commitment to excellence in teaching and research**

The current Chief Justice of Ontario, Warren Winkler, served as the chair of an interest arbitration board at this university in 2006. In his award, Chief Justice Winkler emphasized that there are two overriding principles governing interest arbitrators serving under UTFA’s Memorandum of Agreement: the replication principle, and the “mutual commitment of the University and the Association to ensuring that the University is a leader among the world’s best teaching and research institutions of higher learning.” As he stated, those two principles are “inextricably interrelated,” since “any attempt to replicate an agreement that might have been reached by the parties [at the University of Toronto] has to take into account the fact that the parties would be bargaining on common ground with respect to their mutual, commendable devotion to the excellence and reputation of the university.”

In short, the Provost’s notion of a wild-eyed arbitrator who would make inappropriate decisions regardless of the values of the institution and the submissions of the parties is simply a fiction with no basis in experience here or elsewhere. We can only assume this fiction serves to disguise the Administration’s real interest in rejecting wider use of interest arbitration: retention of unilateral control.

### **4. Interest arbitration is a conservative rather than a radical process because the arbitrators are an experienced group of professionals who understand their role in the process**

The Provost has made some curious statements about lawyers and legal processes. On the one hand, she derisively claims that UTFA’s proposals would put decisions requiring academic judgment in the hands of “lawyers”. On the other hand, after suggesting lawyers and arbitrators are somehow untrustworthy or incompetent in such matters, she praises the courts as a venue for dealing with disputes over academic matters.

It is true that the courts in general terms have been wary of reviewing academic decisions and have shown great deference to both academic decisions and the peer review processes that universities employ. They are also mindful that unwarranted intervention on substantive academic matters could undermine the values of excellence and self-governance that lie at the very heart of a fine research-intensive university

such as our own. This is why negotiations over academic policies should be propelled not by court decisions, but by a robust collective bargaining process with provision for good faith negotiations and dispute resolution. On this we can certainly agree with the Provost.

But what of interest arbitrators? In Canada, the ranks of arbitrators who do interest arbitration in labour relations matters are generally confined to a small and expert group of professionals. Interest arbitrators who have been involved in negotiations at the University of Toronto, for example, have historically been drawn from the most sophisticated and leading arbitrators in the country, and have included the very same judges from the very same courts that the Provost praises for their deference to academia. For example, Justice Alan Gold from Quebec has served as an interest arbitrator at the University of Toronto, as has the current Chief Justice of Ontario, Warren Winkler. The fact is that professional and expert arbitrators, with experience in university and academic matters, are likely to be keenly aware of the need for appropriate deference to substantive academic judgments. And they are professionally trained and expert in working within the context of the negotiations with which they become involved. Involving professional interest arbitrators is entirely appropriate for assisting UTFA and the Administration to come to fair and reasonable settlements over academic policies.

**5. Interest arbitration is a conservative process because the arbitrators are generally chosen on consent**

The parties typically agree on who the arbitrator will be; in fact, UTFA and the Administration have typically agreed, for more than twenty years, on the most experienced mediators and arbitrators in the country. If UTFA and the Administration were unable to agree on a neutral third party professional to serve in these roles (which to our knowledge has never happened), the MOA provides for appointment of a neutral third party professional by the Chief Justice of Ontario.

**6. Interest arbitration is a conservative process especially where mediation/arbitration is the dispute resolution mechanism**

At the University of Toronto, our bargaining features not only a final arbitration phase, if necessary, but also a prior mediation phase. Often these phases involve the same third party neutral professional. While not all parties use mediation/arbitration (“med/arb”) as a device in bargaining, many parties choose to do so. Med/arb exposes the arbitrator to the parties and their positions first in an informal closed process where the mediator/arbitrator normally meets privately with the parties and discusses with them their interests, positions, concerns and priorities. The mediator tries to facilitate and help the parties to come to their own agreement. Sometimes the mediator will expose her/his own views on matters and sometimes s/he won't. Usually an experienced mediator /arbitrator will use her/his leverage with the parties to bring home to them the risks that each faces if the matter proceeds to arbitration. Med/arb is therefore seen as an important tool for facilitating agreement and avoiding arbitration, where possible.

Med/arb has been used extensively by the faculty association and the Administration at the University of Toronto. It functions as a method of educating the mediator/arbitrator directly by the parties themselves in closed sessions prior to any arbitration of the viewpoints of the parties should such an award be necessary. The Administration of the University of Toronto could never claim in such a process that it lacked opportunity to educate the arbitrator as to its point of view and the basis for its concerns. In this respect the Provost's criticisms of interest arbitration seem blind to the actual experience of the med/arb process as it has existed at the University of Toronto for more than twenty years.<sup>1</sup>

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<sup>1</sup> In fact one of the criticisms of the existing system at the University of Toronto is the parties have become reliant on the services of an outsider in med/arb at the expense of building more experience with negotiating their own agreement. UTFA is committed to working on moving closer to resolution during negotiations.

### C. Comparison of the University of Toronto to other Ontario universities

The Provost has also suggested that other Ontario universities have recognized that it is inappropriate to leave to interest arbitrators decision-making with respect to terms and conditions of employment. According to the Provost, “the question for colleagues to consider is the wisdom of treating an academic matter such as tenure the same way as salary and benefits, and very recently, workload are treated”. And according to the Vice-Provost, Edith Hillan, “the fact that the MOA provides for interest arbitration only in relation to salary and benefits and workload is NOT an indication that the MOA is somehow ‘antiquated’ or ‘deficient’ compared to certified collective agreements”; rather, she suggests, “many faculty collective agreements at Ontario universities do not provide for any form of binding interest arbitration – a situation whereby external labour arbitrators can determine terms and conditions of employment that are not mutually agreed to by the university and the faculty association.”

These arguments are misleading. No doubt, at the time the Memorandum was negotiated, it was a breakthrough in providing faculty and librarians with a meaningful process for negotiating salary and benefits. But, over three decades later, we have been passed by. Now, it is in fact our Memorandum that is both antiquated and deficient. Bargaining processes at almost all the other universities in Ontario are full scope, require each party to address in good faith issues important to the other, and feature prescribed means to resolve any disputes that might arise. In contrast, at the University of Toronto, the Administration retains the unilateral right to simply say no without explanation to faculty association proposals (as they are doing now to UTFA’s proposal dealing with procedural aspects of academic planning). More generally, either party can simply refuse to bargain in good faith about any conditions of employment that are not included in the scope of Article 6 of the MOA. In short, the norm in Ontario universities is either a right to arbitrate terms and conditions of employment without restriction when necessary to resolve impasses,<sup>2</sup> or a right to strike without restriction. The University of Toronto Administration is virtually alone in seeking to maintain the degree of unilateral control that it now has. And this degree of control is an affront to the very ideals of shared and collegial governance.

The Administration also emphasized that under the existing Memorandum, UTFA can negotiate frozen policies. While there is no doubt that UTFA can seek to negotiate changes to the frozen policies, the association is powerless and without recourse if the negotiations come to an impasse, which will happen every time the Administration simply decides to refuse to make any changes. Yet, it is fundamental that all negotiations must take place with provision for some mechanism of dispute resolution; the unique situation at the University of Toronto is that there is no system of dispute resolution in frozen policy negotiations, and therefore no authentic accountability. And this does not even address Administration’s complete unilateral authority on matters that fall outside of the frozen policies.

The result is an immature, lopsided and unfair process. At present, all UTFA can do in respect of frozen policies is ask for change and remain powerless if and when the Administration refuses. “Working groups” are one way the Administration periodically offers to UTFA to deal with issues. While such groups can produce useful ideas, unless they are part of the Article 6 process, they have no formal accountability or recourse mechanism in the event of disagreement. While the Administration cannot force UTFA to negotiate frozen policies either, the Administration can and does augment and circumvent frozen policies by issuing unilateral guidelines and memos, some of which have become de facto policies. A prominent example is Provostial Memo #134 dealing with the tenure process, an important guideline that was simply imposed by the Provost of the day. Unilateral imposition of tenure policies and procedures by the Administration is hardly what we need, and instead constitutes a direct and serious threat to academic freedom.

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<sup>2</sup> In fact, two Ontario universities (Ryerson and OCAD) have faculty associations with status under the Labour Relations Act where the parties themselves have agreed to interest arbitration on all terms and conditions of employment. Until recently Queen’s was in the same situation.

At bottom, it appears that the Administration's position is to oppose any change that would see its unilateral authority weakened. This means the Administration is opposed to an accountable, fair and authentic mechanism for ensuring meaningful bargaining by faculty and librarians. Interest arbitration, far from being a threat to the values of collegial self-governance and excellence as the Administration asserts, is consistent with ensuring that there are processes in place respecting and promoting core fundamental values in our university, namely collegiality, self-governance, and academic freedom.

We recognize that interest arbitration is less likely than the strike/lockout mechanism to lead to major breakthroughs and thus more dramatic improvements for faculty and librarians on non-compensation matters. Nonetheless, in light of the history and culture of our University, and because of the preference of our members to seek reform of our current arrangement as an alternative to outright union certification, UTFA has proposed expanding the scope of mediation and arbitration. Like democracy, interest arbitration is not a perfect system, but to many it is better than the alternatives, and certainly preferable to the status quo.

We do not know where our ongoing dispute will lead. However, one thing seems evident, namely, that the continuation of the status quo – i.e., no meaningful bargaining dispute resolution mechanism for any terms and conditions of employment that fall outside of compensation and workload – is highly problematic, and for many members, no longer an option.

Seen in this context, the debate about interest arbitration is somewhat of a red herring. The real decision that faculty and librarians must collectively make is whether we are committed and prepared to change the status quo, so that we can have a meaningful say over those terms and conditions of employment that fundamentally affect our working lives.

As the term draws to a close, we wish you all the best for the exam period and the holiday season to follow. All comments, concerns, and questions pertaining to UTFA bargaining may be directed to [bargaining@utfa.org](mailto:bargaining@utfa.org).

Your negotiating team in the current round is:

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*UTFA Bargaining Report* is published by:  
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